



December 13, 2000

Mr. Roy William Cabler
Henslee, Fowler, Hepworth & Schwartz
800 Frost Bank Plaza
816 Congress Avenue
Austin, Texas 78701-2443

OR2000-4690

Dear Mr. Cabler:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 142201.

The McCamey Independent School District (the "district"), which you represent, received a request for the personnel file of a former district employee. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.102 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.

Initially, we note that Exhibit B3 consists of information that is subject to required public disclosure under section 552.022(a)(2) of the Government Code. Section 552.022(a) provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

(2) the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body[.]

Gov't Code § 552.022(a)(2). Exhibit B3 appears to be a summary of salary information pertaining to two employees of the district. Although the district raises sections 552.101 and 552.102 of the Government Code, which protect information that is deemed to be

confidential under other law, you do not direct our attention to any other law under which salary information pertaining to public employees is confidential. Therefore, the information in Exhibit B3 must be released pursuant to section 552.022(a)(2).

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including information that is encompassed by constitutional and common law rights of privacy. Constitutional privacy under section 552.101 protects two kinds of interests. See Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987); see also *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977). The first is the interest in independence in making certain important decisions related to the "zones of privacy," pertaining to marriage, procreation, contraception, family relationships, and child rearing and education, that have been recognized by the United States Supreme Court. See Open Records Decision No. 455 at 3-7 (1987); see also *Fadjo v. Coon*, 633 F.2d 1172 (5th Cir. 1981). The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. See Open Records Decision No. 455 at 6-7 (1987); see also *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985), *reh'g denied*, 770 F.2d 1081 (1985), *cert. denied*, 474 U.S. 1062 (1986). Constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." Open Records Decision No. 455 at 8 (1987) (quoting *Ramie v. City of Hedwig Village*, 765 F.2d at 492).

Information must be withheld from the public under section 552.101 in conjunction with common law privacy when (1) it is highly intimate and embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. See *Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The specific matters considered to be intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* include sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimacy, psychiatric treatment, attempted suicide, and injuries to reproductive organs. *Id.* at 683; see also Open Records Decision No. 659 at 5 (1999).

Section 552.102(a) protects "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" The protection that section 552.102(a) provides to personnel records corresponds to that which section 552.101 provides under common law privacy and *Industrial Foundation*. See *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Employee privacy under section 552.102(a) is narrower than common law privacy under section 552.101, however, because of the greater legitimate public interest in matters involving public employees. See, e.g., Open Records Decision Nos. 473 at 3 (1987), 444 at 3-4 (1986), 423 at 2 (1984). Generally, section 552.102(a) protects employee information from disclosure only when the information in question reveals "intimate details of a highly personal nature." See Open Records Decision No. 423 at 2 (1984).

In this instance, the district claims that Exhibits B, D, and E contain information that is excepted from disclosure under sections 552.101 and 552.102. Having carefully reviewed the information that the district seeks to withhold, we conclude that you have not demonstrated that any of the information in question is excepted from disclosure under sections 552.101 and 552.102 in conjunction with constitutional or common law privacy.

Section 552.101 also protects information that is made confidential by another statute. Section 261.201 of the Family Code provides in relevant part:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). You assert that the information which you have marked in Exhibits E2 through E4 and the entirety of Exhibits E5 through E8 are confidential under this statute. However, upon careful review of the information in question, we conclude that it is not within the scope of section 261.201 of the Family Code. Therefore, that information may not be withheld from disclosure under section 552.101 of the Government Code.

We note, however, that Exhibits E5 through E8 contain information that falls within the purview of sections 552.026 and 552.114 of the Government Code and the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"). Section 552.114 excepts from disclosure student records at an educational institution funded completely or in part by state revenue. Section 552.026 provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1). "Education records" means those records that contain information directly related to a student and are maintained by an

educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A). This office generally applies the same analysis under section 552.114 and FERPA. Open Records Decision No. 539 (1990).

In Open Records Decision No. 634 (1995), this office concluded that (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception.

Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." *See* Open Records Decision Nos. 332 (1982), 206 (1978). We have marked the information in Exhibits E5 through E8 that must be withheld from disclosure pursuant to sections 552.026 and 552.114 and FERPA.

Section 552.102(b) excepts from disclosure "a transcript from an institution of higher education maintained in the personnel file of a professional public school employee." However, "the degree obtained or the curriculum on a transcript in the personnel file of the employee" is not protected from disclosure. You claim that Exhibits C1 and C2 are excepted under section 552.102(b) as transcripts of a district employee. Having reviewed those documents, we agree that section 552.102(b) is applicable to Exhibits C1 and C2. Therefore, except for the degree obtained and the curricula, the district may withhold Exhibits C1 and C2 under section 552.102(b).

The submitted records also contain information that is excepted from disclosure under section 552.117 of the Government Code. Section 552.117(1) excepts from disclosure the home address, home telephone number, and social security number of a present or former government employee, as well as information revealing whether the employee has family members, *if the present or former employee timely requested that this information be kept confidential under section 552.024*. *See* Open Records Decision Nos. 622 (1994), 455 (1987). However, this information may not be withheld in the case of a present or former employee who made the request for confidentiality under section 552.024 after the request for information was made. Whether a particular piece of information is public must be determined at the time the request for it is made. Open Records Decision No. 530 at 5 (1989). In this instance, you have submitted documentation which demonstrates that the employee at issue made a timely election under section 552.024. Therefore, the district must withhold information appearing in Exhibits B, D, and E3 through E5 that is excepted from disclosure under section 552.117.

Lastly, we also note that the submitted records contain motor vehicle record information that is governed by section 552.130 of the Government Code. Section 552.130 provides in relevant part:

(a) Information is excepted from [required public disclosure] if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state;

(2) a motor vehicle title or registration issued by an agency of this state; or

(3) a personal identification document issued by an agency of this state or a local agency authorized to issue an identification document.

Gov't Code § 552.130(a). The district must withhold the Texas driver's license number that appears in Exhibit D in accordance with section 552.130.

In summary, the district must withhold the information that we have marked in Exhibits E5 through E8 that is excepted under sections 552.026 and 552.114 of the Government Code and FERPA. Exhibits C1 and C2 must be withheld under section 552.102(b), except that the district may not withhold the degree obtained and the curricula listed in those exhibits. The district also must withhold the information in Exhibits B, D, and E3 through E5 that is excepted under sections 552.117 and 552.130. The rest of the submitted information is not excepted from disclosure and must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the

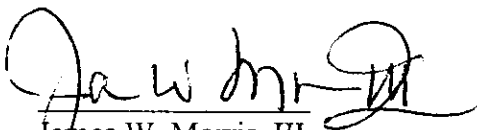
governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.-Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/er

Ref: ID# 142201

Encl: Submitted documents

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(w/o enclosures)